

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES MCDONALD,) No. C10-1952RSL
Plaintiff,)
v.) ORDER DENYING
ONEWEST BANK, FSB, *et al.*,) RECONSIDERATION¹
Defendants.)

This matter comes before the Court on a timely “Motion for Reconsideration or Clarification” filed by defendant Mortgage Electronic Registration Systems, Inc. (“MERS”). Dkt. # 244. On March 7, 2013, the Court found that plaintiff had established most of the elements of a Consumer Protection Act claim against MERS, but had not established his damages despite identifying recoverable injury to business or property. MERS seeks reconsideration on the grounds that (a) the Court misapplied Bain v. Metropolitan Mortg. Group, Inc., 175 Wn.2d 83 (2012), when it ignored the fact that MERS was acting as an agent for the lender and (b) there is no evidence linking MERS’ allegedly deceptive conduct to plaintiff’s damages. Motions for reconsideration are disfavored in this district and will be granted only upon a “showing of manifest error in the prior ruling or a showing of new facts or legal authority

¹ Pursuant to LCR 7(h)(3), “[n]o response to a motion for reconsideration shall be filed unless requested by the court.” Plaintiff’s unauthorized response (Dkt. # 247) has not been considered in ruling on defendant’s motion.

ORDER DENYING RECONSIDERATION

1 which could not have been brought to [the Court's] attention earlier with reasonable diligence."
 2 LCR 7(h)(1).

3 **A. Application of Bain**

4 In its opposition to plaintiff's motion for summary judgment and again in this
 5 motion, MERS attempts to distinguish Bain by arguing that it acted solely as the agent of the
 6 note holder, OneWest or, alternatively, the Federal Home Loan Mortgage Corporation ("Freddie
 7 Mac"). Dkt. # 182 at 25. See also Dkt. # 244 at 7. The only evidence cited in support of the
 8 agency argument is what appears to be a computer printout² that identifies OneWest as the
 9 servicer of the loan, Deutsche Bank National Trust Company as the custodian (presumably of
 10 the note), and Freddie Mac as the investor. Dkt. # 99 at 17. MERS is not mentioned except in
 11 the internet address printed at the bottom of the page. Neither this document nor the remainder
 12 of the record establishes that OneWest or Freddie Mac authorized MERS to act on their behalf or
 13 that MERS agreed to accept direction from and control by one or more of the entities MERS
 14 now claims as its principals.

15 Nor does the deed of trust in this matter support MERS' bald claim of agency.
 16 The deed identifies MERS as "a nominee for Lender and Lender's successors and assigns"³ and
 17 as "the beneficiary" under the deed of trust. Dkt. # 1-2 at 1-2. A "nominee" is commonly
 18 understood as a designated recipient or representative, or one in whose name a stock or other
 19 certificate is registered but who is not the actual owner. The latter definition is consistent with
 20 the general arrangement that appears to have existed between and amongst the parties to the
 21 deed of trust. It does not, however, describe an agency relationship. Even if the Court were
 22 willing to assume that the parties to the deed of trust intended that MERS would act as the agent
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24 _____
 25 ² The declaration to which this document is attached identifies all of Exhibit 1 as documents
 produced on a certain date during discovery. Dkt. # 99 at ¶ 2.

26 ³ This is the same designation included in the deed of trust at issue in Bain. 175 Wn.2d at 107.

1 of the original lender, there is, as discussed above, no evidence that successor holders of the note
 2 intended to continue that relationship.

3 The second assertion in the deed – that MERS was the beneficiary – was simply
 4 untrue. MERS was not the lender and never possessed the promissory note, either directly or
 5 through an agent. It could not, therefore, claim to be the beneficiary under Washington law.
 6 The Court declines to reconsider its finding that the characterization of MERS as the beneficiary
 7 in the deed of trust when it knew or should have known that it must have actual possession of
 8 the note to be the beneficiary under Washington law has the capacity to deceive for purposes of
 9 a CPA claim.

10 **B. Causal Connection Between Deceptive Act and Injury**

11 Throughout this proceeding, MERS' arguments tended to mirror those put forth by
 12 defendant OneWest Bank, FSB, and were in large part based on a theory of constructive
 13 possession that has now been rejected. Relevant to the pending motion for reconsideration, the
 14 Court notes that defendants raised only joint arguments regarding the types of damages that are
 15 recoverable under the CPA and causation: no attempt was made to differentiate between and
 16 among the defendants. Dkt. # 172 at 36-37;⁴ Dkt. # 182 at 27-28. Having associated new
 17 counsel following entry of the summary judgment order, MERS now argues that plaintiff would
 18 have incurred the same investigative expenses regardless of any deceptive statements and/or
 19 assignments MERS made.

20 This argument is both untimely and unpersuasive. MERS could have, but did not,
 21 raise its individual causation arguments while the summary judgment motions were pending. No
 22 new facts or legal authority have been identified. Nor has MERS shown manifest error.
 23 Although plaintiff's efforts to locate the original promissory note at various points in the loan's

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 25 ⁴ Contrary to MERS' current assertions (Dkt. # 244 at 5-6), it did not put forth a "separate
 26 analysis as to its potential CPA liability" or seek summary judgment on plaintiff's CPA claim (Dkt.
 # 172 at 37).

1 history began only after he received the notice of default, it is entirely plausible that those efforts
2 were frustrated by the fact that the first identified beneficiary – MERS – did not actually hold the
3 note. If plaintiff is able to show that MERS’ deceptive statements and assignments made it more
4 difficult, time-consuming, and expensive for him to ascertain the note’s current location and/or
5 its location when material assignments, appointments, and notices were made, he may be entitled
6 to a finding of liability against MERS under the CPA.

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9 For all of the foregoing reasons, MERS’ motion for reconsideration (Dkt. # 244) is
10 DENIED.

11 Dated this 1st day of April, 2013.

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14 Robert S. Lasnik
United States District Judge
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